No. 95-990

(4)

Supreme Court, U. S.
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CLERK

In The

Supreme Court of the United States

October Term, 1995

ROLAND A. JONES,

Petitioner,

vs.

SECRETARY OF THE ARMY, et. al.

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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5 P

THE SUMMARY JUDGMENT ADJUDICATED FEWER THAN ALL CLAIMS

Fewer than all of my claims were adjudicated:

> **[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims.**
>
> **"*Hains* teaches that the decision on the merits... should normally be postponed until the facts have been ascertained *Polk Co v. Glover*, 305 U.S. 5 . . . so that courts may avoid elucidating legal responsibilities as to facts which may never be *Shull v. Pilot Life Ins. Co.*, 313 F. 2d 445, 447. (Stevens, dissenting, *Estelle v. Gamble*, 429 U.S. 1976."**

This Court's rules of summary judgment require that parties go beyond the pleadings when summary judgment is filed. *Celotex Corp. v. Catrett*, 477 U. S. 317 (1986), 325. I did this. (Supp. Brief, App. 3, pgs. 7a-15a), and respondents did not demonstrated "there is no genuine issue as to any material fact" entitling them to judgment.

There is nothing in the record that shows the court of appeals (Pet. Apps. B and C, pgs. 10a and 13a), or the district court (Pet. App. E, pg. 20a) adjudicated the following claims/issues:

I.

Passover letters stamped as "PERMANENT" just will not go away even when ordered away by the Secretary of the Army ("Secretary"), or mandated away by a federal court of appeals. The Army Board for the Correction of Military

Records ("ABCMR") had four (4) opportunities, from 1976 to 1985, to automatically remove the 1974 and 1975 passover letters from my record: 1. On January 26, 1976, when the Secretary ordered "that the military records of all eligible primary zone officers. . .be appropriately reconstituted" (as my record appeared before the 1974 and 1975 boards were convened, with no passover letters) (Pet. App. A2, p. 7a, par. 4b); 2. in 1980 when *Dilley v. Alexander*, 627 F.2d 407 at 409, 413, 924, (1980) declared my 1976 Relook promotion board to be illegal and, again, ordered them removed;[1] and 3. when respondent John Mathews convened the bogus June 29, 1983, ABCMR panel placed my record before its 1983 "Relook" promotion board; and 4. On February 28, 1985, when Deputy Assistant Secretary of the Army John Mathews' refused stating:

> "I specifically reject any offer you might be be trying to convey. . ." (Pet. App. F, p. 25a).

Respondents acknowledged (Pet. App. M, p. 48a) "the plaintiff alleges as his last claim against the Board that it discriminated against him by failing to act on its own volition to remove passover letters from his record as

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[1] . . .all records, including those reflecting nonselection by the promotion selection boards, be corrected to put appellants in the position they would have occupied had the Army not engaged in its unlawful selection procedure . . .they should not contain any adverse reference to the passing over of appellants for promotion by the selection boards of 1975 and 1976...The 1976 Boards. . . had before them records that reflected appellants' nonselection in 1975 even though appellants had never been lawfully passed over. Thus establishment of the RelookBoards had no effect on appellants' status before the 1976 Boards, though it should have if appellants were to be placed in the same position they were in before 1975...This error was not insignificant, for the promotion prospects of an officer already once 'passed over' by a selection board are narrow."

mandated by *Dilley v. Alexander*, 627 F.2d 407 (D.C. Cir. 1980)".

Because the ABCMR did not remove the 1974 and 1975 passover letters from my record, my 1979 and 1980 promotion boards were "inherently tainted" (Pet. App. M, p. 49a, I was not selected for to permanent (tenured) Lieutenant Colonel, RA, and I was forced to retire in 1980 (Pet. App. K2, p. 39a) as a permanent Major, Regular Army ("RA"). Had I not been forced to retire effective October 1, 1980, from 1980 to the present time I could have attained much higher ranks in the Army of the United States ("AUS") and in the Regular Army, instead of being forced retire as a temporary Lieutenant Colonel, AUS.

II.

The ABCMR, on two (2) occasions, admitted[2] that it did not act on my 1975-76 applications to correct my record:

> June 4, 1990: "there was never a board constituted in the 1970's which reviewed plaintiff's record. . . the plaintiff's records were never reviewed by the ABCMR board in the listed years." [2] (Pet. App. N, p. 50a and 51a).
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> April 11, 1991: "Additionally, it is equally plausible that the ABCMR did not respond or act upon plaintiff's . . . because the plaintiff had not completed the exhaustion of his administrative remedies." [2] (Pet. App. M, 47a),

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[2] Federal Rule Civil Procedure 36(b):

> "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

The district court found that my 1975 applications were properly before the ABCMR. (Pet. App. E, p. 22a).

III.

February 28, 1985, Mathews' conspired to covered-up the ABCMR's not acting during 1975-76, 1983-85 and not removing the"PERMANENT" passover letters per *Dilley*:

> "I specifically reject any offer you might be be trying to convey. . ." (Pet. App. F, p. 25a).

IV.

Under 10 U.S.C. 1552 and its implementing regulations 32 CFR 581.3(b)(1)(ii)(2) and (3), and Section II, 4 and 5, Army Regulation ("AR") 15-185, the ABCMR has a nondiscretionary, judicially enforceable, duty to correct records. *Chappell v. Wallace*, 462 U.S. 296, at 303 (1983); *Baxter v Claytor*, 652 F.2d 181,185 (D.C. Cir. 1981); *Sanders v. United States*, 594 F.2d 804 (1979); *Skinner v. United States*, 594 F.2d 824 (1979); Dilley v. Alexander, 603 F.2d 914 (1979) and 627 F.2d 407 (1980); *Blassingame v. Secretary of the Navy*, 811 F. 2d. 65 (2d Cir. 1987); *Neal v. Secretary of the Navy*, 639 F. 2d. 1029 (3rd Cir. 1981); *Marcotte v. Secretary of Defense*, 618 F.Supp. 756, 763, (D.C. Kan., 1985).

CONCLUSION

For the foregoing reasons, and those contained in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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